

**United States Department of Labor
Employees' Compensation Appeals Board**

E.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Stamford, CT, Employer**

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**Docket No. 17-1699
Issued: December 18, 2018**

Appearances:

David P. McCormack, Esq., for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge

ALEC J. KOROMILAS, Alternate Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 1, 2017 appellant, through counsel, filed a timely appeal from a February 17, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ Together with his appeal request, appellant submitted a timely request for oral argument pursuant to 20 C.F.R. § 501.5(b). By order dated February 1, 2018, the Board exercised its discretion and denied the request as appellant's arguments on appeal could be adequately addressed in a decision based on a review of the case as submitted on the record. *Order Denying Request for Oral Argument*, Docket No. 17-1699 (issued February 1, 2018).

ISSUE

The issue is whether appellant has met his burden of proof to establish more than 31 percent permanent impairment of his right lower extremity, for which he previously received a schedule award.

FACTUAL HISTORY

On June 21, 2013 appellant, then a 59-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he developed permanent acceleration of osteoarthritis of his right hip due to factors of his federal employment. He underwent right total hip replacement surgery on March 5, 2012. By decision dated October 2, 2013, OWCP accepted the claim for aggravation of preexisting osteoarthritis of the right hip.

On October 22, 2013 appellant filed a claim for a schedule award (Form CA-7).

In a February 27, 2013 report, Dr. Frank A. DiFazio, a Board-certified orthopedic surgeon, found that appellant's right hip examination showed a well-healed surgical scar and no swelling, erythema, warmth, or focal tenderness. He advised that appellant was capable of working with restrictions of no prolonged standing, walking, or lifting greater than 40 pounds. Dr. DiFazio opined that appellant had reached maximum medical improvement (MMI) and had 37 percent permanent impairment of the right lower extremity based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁴

On October 10, 2013 Dr. Byron V. Hartunian, an orthopedic surgeon, opined that appellant had 37 percent permanent impairment of the right lower extremity using the sixth edition of the A.M.A., *Guides*.⁵ He concurred with Dr. DiFazio that appellant had reached MMI as of February 27, 2013. Dr. Hartunian diagnosed status post right total hip replacement for end-stage degenerative arthritis. He measured appellant's range of motion (ROM) of the right hip using a goniometer three times with the highest range recorded for flexion 98 degrees, abduction 26 degrees, and adduction 20 degrees. On combined flexion and rotation appellant experienced some mild right groin discomfort. Based on the sixth edition of the A.M.A., *Guides*, Dr. Hartunian calculated that appellant's total hip replacement condition was consistent with a class 3 diagnosis because there was a mild motion deficit in flexion and rotations, per Table 16-24. There were no other physical findings documented so he found that a grade modifier for physical examination (GMPE) was not applicable. Dr. Hartunian found that a grade modifier for clinical studies (GMCS) was not applicable because x-rays taken approximately one year after surgery confirmed the diagnosis. He assigned a grade modifier of zero for functional history (GMFH) because there was no antalgic limp. Dr. Hartunian assigned a grade modifier of 3 for severe deficit based on the American Academy of Orthopaedic Surgeons (AAOS) Lower Limb Questionnaire completed by appellant. He indicated that the A.M.A., *Guides* indicated that the higher grade modifier of 3 was to be used in the calculation and therefore the net adjustment formula resulted in a class 3, grade C impairment, equaling a 37 percent impairment rating for the right lower extremity.

⁴ A.M.A., *Guides* (5th ed. 2001).

⁵ *Id.* at (6th ed. 2009).

Appellant submitted a copy of his AAOS Lower Limb Questionnaire dated May 9, 2013.

On November 12, 2013 Dr. Robert Y. Pick, a Board-certified orthopedic surgeon and OWCP district medical adviser (DMA), reviewed the medical evidence of record and opined that appellant's right total hip replacement on March 5, 2012 was unrelated to his accepted condition or factors of his federal employment.

On March 27, 2014 another DMA, Dr. Morley Slutsky, a Board-certified occupational medicine specialist, disagreed with Dr. Pick and found that appellant's March 5, 2012 surgery was warranted and necessitated by his accepted work-related condition. Based on the sixth edition of the A.M.A., *Guides*, he calculated that appellant had a class 3 diagnosis for status post right hip surgery with good results because his hip ROM had a mild deficit, the hardware had good placement, and there was no hip instability. Dr. Slutsky assigned a grade modifier of zero for physical examination because there was no tenderness, swelling, erythema, or increased warmth and a grade modifier of zero for functional history because appellant did not have an antalgic gait requiring the use of a single gait aid or external orthotic device for stabilization. Dr. Slutsky noted that there was no documentation of a positive Trendelenburg's sign. He found that Dr. Hartunian's grade modifier of 3 secondary to appellant's AAOS score was unreliable and would not be used for impairment calculations because the score was 3 grade modifiers greater than the GMFH of zero. Dr. Slutsky concurred with Dr. Hartunian that a grade modifier for clinical studies was not applicable because there were no studies presented at MMI that were specific to the diagnosis being rated. He concluded that appellant had 31 percent permanent impairment of the right lower extremity.

In an April 7, 2014 letter, OWCP provided a copy of Dr. Slutsky's March 27, 2014 report to Dr. Hartunian and requested a supplemental report providing an opinion about appellant's work-related condition and any resulting impairment. Dr. Hartunian did not respond.

OWCP referred appellant to Dr. Balazs B. Somogyi, a Board-certified orthopedic surgeon, for a second opinion evaluation. In his December 9, 2014 report, Dr. Somogyi found that appellant reported right hip pain and difficulties with getting on a bed due to soreness "stiffness." The ROM of the left hip was full and painless and the ROM of the right hip revealed flexion performed to 90 degrees. Extension was full and abduction was somewhat restricted. Rotational movements were significantly restricted. There were no palpatory findings. Dr. Somogyi determined that appellant reached MMI in March 2013, one year after his right hip surgery. He calculated that appellant had a default impairment of 37 percent for his diagnosis of status post right total hip replacement surgery. Dr. Somogyi assigned a grade modifier of 2 for functional history and physical examination because appellant had moderate problems with his right lower extremity. He stated that a grade modifier for clinical studies was not applicable in this case. Dr. Somogyi concluded that appellant had 31 percent permanent impairment of the right lower extremity.

In a supplemental report dated March 9, 2015, Dr. Somogyi asserted that his opinion was based upon the available information at the time, including the contents of a previously completed second opinion examination regarding appellant's case.

By decision dated July 30, 2015, OWCP awarded appellant a schedule award for 31 percent permanent impairment of the right lower extremity. The award ran for 89.28 weeks for the period February 27, 2013 to November 13, 2014 and a fraction of a day.

On August 5, 2015 counsel requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated November 23, 2015, an OWCP hearing representative found that the case was not in posture for a hearing and vacated the prior decision because further development of the medical evidence was warranted as Dr. Somogyi's second opinion evaluation lacked probative value. The hearing representative found that Dr. Somogyi failed to identify the tables and pages of the A.M.A., *Guides* he used to calculate appellant's impairment rating and a specific date of MMI for schedule award purposes.

In a supplemental report dated February 23, 2016, Dr. Somogyi indicated that he relied on Table 16-4, page 515, of the A.M.A., *Guides*. He stated that appellant's impairment rating was based on a class 3 impairment of the hip as identified on page 515. Dr. Somogyi assigned a grade modifier of one for functional history and physical examination for mild problems. He calculated that the net adjustment was two, which resulted in an impairment of 31 percent permanent impairment of the right lower extremity for degenerative arthritis and total hip replacement. Dr. Somogyi determined that appellant's date of MMI was February 27, 2013.

On March 20, 2016 Dr. Herbert White, a Board-certified internist and occupational medicine specialist serving as a DMA for OWCP, reviewed the medical evidence of record and concurred with Dr. Somogyi's impairment rating. Utilizing Table 16-4, page 515, of the A.M.A., *Guides*, Dr. White calculated that appellant had a default impairment rating of 37 percent for his diagnosis of total right hip replacement. He assigned a grade modifier of one for functional history for his antalgic gait. Dr. White found that a grade modifier for physical examination was excluded because it was used to determine the class and he assigned a grade modifier of zero for clinical studies because "none available." Using the net adjustment formula of $(GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX)$, Dr. White calculated that appellant had a net adjustment of $(1-3) + (\text{not applicable}) + (0-2) = -4$, which he equated to 31 percent permanent impairment of the right lower extremity.

By *de novo* decision dated March 22, 2016, OWCP again awarded appellant a schedule award for 31 percent permanent impairment of the right lower extremity. The award ran for 89.28 weeks for the period February 27, 2013 to November 13, 2014 and a fraction of a day.

On August 1, 2016 counsel requested reconsideration.

In a July 21, 2016 report, Dr. Hartunian reviewed the medical evidence of record and concurred that appellant had a class 3 diagnosis and that a grade modifier for physical examination was properly excluded. Regarding the functional history, he found that appellant had a gait derangement score of 1. Dr. Hartunian noted that the AAOS score supported a grade modifier for functional history of 3 and he stated that the A.M.A., *Guides* required that the higher AAOS score be used. He found, however, that the higher AAOS score differed by 2 or more from that of the physical examination and the clinical studies and; therefore, the functional history (not the AAOS score) was properly excluded as unreliable. Regarding the clinical studies, Dr. Hartunian found that it was also properly excluded for the additional reason that the diagnostic reports merely confirmed appellant's diagnosis. Using the net adjustment formula of $(GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX)$, Dr. White calculated that appellant had a net adjustment of (not

applicable) + (not applicable) + (not applicable) = 0, yielding a class 3, grade C diagnosis, which equated to 37 percent permanent impairment of the right lower extremity.

On September 27, 2016 and February 7, 2017 Dr. White confirmed that he excluded physical and clinical studies from appellant's impairment rating calculation.

In a December 28, 2016 report, Dr. White further clarified that he disagreed with Dr. Hartunian's interpretation of the A.M.A., *Guides*. He stated that appellant's antalgic gait would not be usual with a total hip replacement and, as a result, the functional history score for an antalgic gait would be assigned a functional history of one. Dr. White explained that if the rating physician had rated functional history as three, then it could be excluded for the reasons Dr. Hartunian outlined. However, to exclude functional history in appellant's case would indicate that he did not have an antalgic gait. In addition, Dr. White noted that excluding functional history because of appellant's unreliability using the AAOS score instead of a score in which the AAOS is used to assist in determining the functional history would actually benefit him, which he did not think was the intention of the A.M.A., *Guides*. He concluded that appellant had a functional history of one (1). Using the net adjustment formula of (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX), Dr. White calculated that appellant had a net adjustment of (1-3) + (not applicable) + (not applicable) = -2, yielding a class 3, grade A diagnosis, which equated to 31 percent permanent impairment of the right lower extremity.

By decision dated February 17, 2017, OWCP denied modification of the March 22, 2016 schedule award decision.

LEGAL PRECEDENT

The schedule award provisions of FECA⁶ and its implementing regulations⁷ provide for compensation to employees sustaining impairment from loss or loss of use of specified members of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁸ The A.M.A., *Guides* has been adopted by OWCP as a standard for evaluation of schedule losses and the Board has concurred in such adoption.⁹ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2009.¹⁰

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404.

⁸ *Id.* at § 10.404(a); *see also* *F.V.*, Docket No. 18-0427 (issued November 9, 2018).

⁹ *See* *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000). *See also* 5 U.S.C. § 8107.

¹⁰ *See* *D.T.*, Docket No. 12-0503 (issued August 21, 2012); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).¹¹ Under the sixth edition, the evaluator identifies the impairment class of diagnosis (CDX) condition, which is then adjusted by grade modifiers based on GMFH, GMPE, and GMCS.¹² The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX). Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnoses from regional grids and calculations of modifier scores.¹³

ANALYSIS

The Board finds that appellant has not established greater than 31 percent permanent impairment of the right lower extremity for which he previously received a schedule award. OWCP properly referred appellant to Dr. Somogyi for a second opinion evaluation to determine the nature and extent of his employment-related permanent impairment. In his December 9, 2014 report, Dr. Somogyi noted that appellant reported right hip pain and difficulties with getting on a bed due to soreness "stiffness." The ROM of the left hip was full and painless and the ROM of the right hip revealed flexion performed to 90 degrees. Extension was full and abduction was somewhat restricted. Rotational movements were significantly restricted. There were no palpatory findings. In his supplemental report dated February 23, 2016, Dr. Somogyi indicated that he relied on Table 16-4, page 515, of the A.M.A., *Guides*. He stated that appellant's impairment rating was based on a class 3 impairment of the hip as identified on page 515. Dr. Somogyi assigned a grade modifier of one for functional history and physical examination for mild problems. He calculated that the net adjustment was two, which resulted in an impairment of 31 percent permanent impairment of the right lower extremity for degenerative arthritis and total hip replacement. Dr. Somogyi determined that appellant's date of MMI was February 27, 2013.

In accordance with its procedures, OWCP properly referred the evidence of record to its OWCP medical adviser, Dr. White, who reviewed the clinical findings of Dr. Somogyi and determined that appellant had 31 percent permanent impairment of the right lower extremity under the sixth edition of the A.M.A., *Guides*. Dr. White concurred with Dr. Somogyi's class 3, grade A diagnosis of right total hip replacement based on Table 16-4, page 515, of the sixth edition of the A.M.A., *Guides*. He assigned a grade modifier of one (1) for functional history for appellant's antalgic gait. Dr. White excluded a grade modifier for physical examination because it was used to determine the class and he excluded a grade modifier for clinical studies because none were applicable in this case. Using the net adjustment formula of (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX), he calculated that appellant had a net adjustment of (1-3) + (not applicable) + (not applicable) = -2, yielding a class 3, grade A diagnosis, which equated to a 31 percent permanent impairment of the right lower extremity. Dr. White discussed how he arrived at his conclusion by listing specific tables and pages in the A.M.A., *Guides*. He properly interpreted Table 16-4 to find that appellant qualified for 31 percent permanent impairment of the right lower

¹¹ A.M.A., *Guides* (6th ed., 2009), p.3, section 1.3, *International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement*.

¹² *Id.* at 494-531.

¹³ See *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

extremity. Thus, the Board finds that OWCP properly relied upon the opinion of its medical adviser in denying appellant's claim for an additional schedule award.

Appellant submitted a July 21, 2016 report from Dr. Hartunian who opined that appellant had class 3, grade C diagnosis, which equated to 37 percent permanent impairment of the right lower extremity. Dr. Hartunian determined that physical examination and clinical studies were properly excluded. He found that appellant had a gait derangement score of 1. Dr. Hartunian argued, however, that functional history should be excluded as unreliable because the higher AAOS score of 3 differed by 2 or more from that of the physical examination and the clinical studies. Thus, he calculated that appellant had a net adjustment of zero, equaling 37 percent permanent impairment of the right lower extremity. The Board has held that when the attending physician fails to provide an estimate of impairment conforming to the A.M.A., *Guides* or does not discuss how he or she arrives at the degree of impairment based on physical findings, his or her opinion is of diminished probative value in establishing the degree of impairment and OWCP may rely on the opinion of its medical adviser to apply the A.M.A., *Guides* to the findings reported by the attending physician.¹⁴ Dr. White explained that if he had rated functional history as three, then it could be excluded for the reasons Dr. Hartunian outlined. However, to exclude functional history in appellant's case would indicate that he did not have an antalgic gait. The Board finds that OWCP's medical adviser in this case properly applied the standards of the A.M.A., *Guides*. His opinion is the weight of medical evidence and supports that appellant does not have a greater right upper extremity impairment than the 31 percent previously awarded.

There is no probative medical evidence of record, in conformance with the sixth edition of the A.M.A., *Guides*, establishing that appellant has more than 31 percent permanent impairment of the right lower extremity. Accordingly, appellant has not established that he is entitled to a schedule award greater than that previously awarded.¹⁵

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish more than 31 percent permanent impairment of the right lower extremity, for which he previously received a schedule award.

¹⁴ See *John L. McClanic*, 48 ECAB 552 (1997); *L.M.*, Docket No. 12-0868 (issued September 4, 2012).

¹⁵ FECA provides for reduction of compensation for subsequent injury to the same body member. It provides that schedule award compensation is reduced by the compensation paid for an earlier injury where the compensation in both cases are for impairment of the same member or function and where it is determined that the compensation for the later disability in whole or part would duplicate the compensation payable for the preexisting disability. 5 U.S.C. § 8108; 20 C.F.R. § 10.404(c).

ORDER

IT IS HEREBY ORDERED THAT the February 17, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 18, 2018
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board